

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7721

Petition of SBA Towers III, Inc., and New Cingular)
Wireless PCS, LLC, d/b/a AT&T Mobility for)
authority, pursuant to 30 V.S.A. § 248a, to install)
wireless communications facilities in Middletown)
Springs, Vermont)

Order entered: 4/20/2011

I. INTRODUCTION

In this Order, the Vermont Public Service Board ("Board") approves the petition filed by SBA Towers III, Inc., and New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility ("AT&T") (together the "Petitioners"), pursuant to 30 V.S.A. § 248a, and the Board's Order implementing standards and procedures under this section ("Procedures Order")¹, and grants the Petitioners a certificate of public good ("CPG") authorizing the installation of telecommunications facilities in the Town of Middletown Springs, Vermont (the "Project"), as part of AT&T's Universal Mobile Telecommunications Service upgrade.

II. BACKGROUND

This case involves a petition and prefiled testimony filed by the Petitioners on February 23, 2011, requesting that the Board issue a CPG, pursuant to 30 V.S.A. § 248a, authorizing the construction of the facilities identified above. Pursuant to the Procedures Order, comments or requests for hearing on an application must be filed within 21 days of the date that the petition was filed with the Board.²

On March 10, 2011, Walter and Kathleen Schmitt, adjoining landowners to the Project site property, filed comments in response to the petition. The Schmitts request that the Board reject the petition and require the Petitioners "to come up with alternative sites or technologies

1. *Order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued August 14, 2009.

2. Procedures Order at 9.

that will provide better coverage and won't harm the fragile ecosystem of our ridgelines and leave a visual scar on our town."³ The Schmitts have not sought intervention or requested a hearing in this docket.

On March 14, 2011, the Middletown Springs Selectboard filed a letter with the Board expressing concerns that the Project will not provide wireless telecommunications coverage to the entire Town and requesting that Petitioner provide alternate sites and tower heights for the Project. The Selectboard has not requested a hearing or sought to intervene in this proceeding.

On March 15, 2011, the Vermont Department of Public Service ("Department") filed a letter with the Board recommending that the Board issue a CPG authorizing installation of the Project without further evidence or hearings.

On March 17, 2011, the Middletown Springs Conservation Commission filed a letter with the Board expressing concerns regarding the Project's potential impact on the surrounding environment and requesting additional information regarding the Project's visual impact and compliance with the Town and Regional Plan. The Conservation Commission has not requested a hearing or sought to intervene in this proceeding.

On April 5, 2011, the Petitioners filed a response to the letters from the Selectboard, the Conservation Commission, and the Schmitts.

On April 14, 2011, the Schmitts filed a letter with the Board in response to the Petitioners' response to their original comments.

On April 16, 2011, the Petitioners filed a response to the Schmitts' April 14, 2011, letter to the Board.

No other comments regarding the Project have been filed with the Board within the prescribed comment period.

The Board has determined that the petition and prefiled testimony have effectively addressed the applicable substantive criteria of 30 V.S.A. § 248a. Consequently, we find that the procedure authorized by § 248a is sufficient to satisfy the public interest, and no hearings are required.

3. Schmitts' comments at 3.

III. FINDINGS

1. The Project is part of AT&T's Universal Mobile Telecommunications Service ("UMTS") upgrade that involves the installation and modification of wireless telecommunications services in Vermont. The ultimate objective of the project is to upgrade AT&T's Vermont network to provide 3G wireless technologies for simultaneous circuit-switched voice and packet-switched data communications. Exh. 8.A. § III.

2. The Project is proposed to be located at 12 McNamara Road in Middletown Springs, Vermont, on property owned by Marshall Squier. Exh. 8.A § I.

3. The Project involves the installation of a new "monopine" telecommunications tower with antennas, an equipment shelter, a generator, and associated operating equipment within a new fenced compound on property leased by AT&T. The Project also includes the construction of a new access road and a parking/turn-around area. Exh. 8.A § II.

4. The Project facilities include a 108-foot-tall monopine tower with up to 12 antennas, each measuring approximately 4 feet high by 1 inch wide by 7 feet deep, mounted at a height of 100 feet on the tower. The equipment shelter will be approximately 11.5 feet by 20 feet by 9 feet high. The diesel-fueled generator will be mounted on a 4-foot by 11-foot platform within the 45-foot by 70-foot fenced compound. The Project also includes the improvement of an existing logging trail to allow for a new 12-foot-wide access road, extending 2,200 feet from McNamara road to the site, and a parking/turn-around area, transformer and bollards to be located directly northeast of the compound. Exh. 8.A § II.

State Telecommunications Policy

[30 V.S.A. § 248a(a)]

5. The Project is consistent with the goal of directing the benefits of improved telecommunications technology to all Vermonters pursuant to 30 V.S.A. § 202c(b). The Project will provide coverage to a largely unserved area of the State and allow interconnection with the other similar AT&T facilities comprising AT&T's Vermont network, some of which have already been upgraded and others that are slated for improvements. Exh. 8.A § III.

**Aesthetics, Historical Sites, Air and Water Purity,
the Natural Environment, and Public Health and Safety**

[30 V.S.A. § 248a(c)(1)]

6. The Project will not have an undue adverse effect on aesthetics, historical sites, air and water purity, the natural environment, and the public health and safety. This finding is supported by findings 7 through 29 below, which are the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a) (1)-(8) and (9)(k).

Outstanding Resource Waters, Headwaters

[10 V.S.A. §§ 1424a(d), 6086(a)(1)(A)]

7. The Project will have no impact on outstanding resource waters or headwaters. Exh. 8.A § IV.

Water and Air Pollution

[10 V.S.A. § 6086(a)(1)]

8. The Project will not result in undue water or air pollution. This finding is supported by findings 9 through 11, below.

9. The Project will not be located near any bodies of water and will not utilize a water supply at the site. Exh. 8.A § IV.

10. Noise associated with construction activities will be short term, and noise from the generator will be limited in the absence of a prolonged power outage. Dust associated with construction vehicles will be controlled at the site. Exh. 8.A § IV.

11. The Radio Frequency Radiation ("RFR") associated with the Project will meet all standards prescribed by the Federal Communications Commission ("FCC"). The RFR emissions from the antenna installation is calculated to be 12.45% of the FCC standard for Maximum Permissible Exposure. Exhs. 8.A § IV and 8.L.

Waste Disposal

[10 V.S.A. § 6086(a)(1)(B)]

12. The Project does not involve disposal of wastes or injection of any material into ground water or wells. Exh. 8.A § IV.

Water Conservation, Sufficiency of Water, and Burden on Existing Water Supply

[10 V.S.A. §§ 6086(a)(1)(C),(a)(2) and (3)]

13. The Project will have minimal impact on water conservation measures, as the Project will not be connected to water supplies. Any water needed in connection with Project construction will be brought in from sources outside the Project site. Exh. 8.A § IV.

Floodways

[10 V.S.A. § 6086(a)(1)(D)]

14. The Project is not located in a floodway. Exh. 8.A § IV.

Streams

[10 V.S.A. § 6086(a)(1)(E)]

15. The Project will not be located on, adjacent to, or near any streams or other water bodies. Exh. 8.A § IV.

Shorelines

[10 V.S.A. § 6086(a)(1)(F)]

16. The Project is not located on a shoreline. Exh. 8.A § IV.

Wetlands

[10 V.S.A. § 6086(a)(1)(G)]

17. The Project is not located near any wetlands. Exh. 8.A § IV.

Soil Erosion

[10 V.S.A. § 6086(a)(4)]

18. The Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water. All construction work will comply with Vermont standards and specifications for erosion and sediment control. Exh. 8.A § IV.

Transportation System

[10 V.S.A. § 6086(a)(5)]

19. The Project will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports or airways, and other means of transportation existing or proposed. Traffic to the unmanned site will be limited following construction. Exh. 8.A § IV.

Educational Services

[10 V.S.A. § 6086(a)(6)]

20. The Project will not cause an unreasonable burden on the ability of a municipality to provide educational services. Educational services will not be impacted by the Project. Exh. 8.A § IV.

Municipal Services

[10 V.S.A. § 6086(a)(7)]

21. The Project will not place an unreasonable burden on the ability of the local government to provide municipal or governmental services. The Project will not require any additional municipal or governmental services. Exh. 8.A § IV.

Aesthetics, Historical Sites, and Rare and Irreplaceable Natural Areas

[10 V.S.A. § 6086(a)(8)]

22. The Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. This finding is supported by findings 23 through 27, below.

23. The Petitioners have taken measures to mitigate the Project's aesthetic impact including siting the Project in a wooded area, using artificial pine branches, and painting the facility to match existing colors and textures of the surrounding environment. Exh. 8.A § IV.

24. The Project does not violate any clearly identified community standards contained in the relevant regional or town plans. Exh. 8.A § IV.

25. The Project will not be shocking or offensive to the average person. Exh. 8.A § IV.

26. The Project will not have an adverse impact on known historic sites. Exh. 8.A § IV.

27. The Project will not have an adverse impact on irreplaceable natural areas. Exh. 8.A § IV.

28. The Project will not destroy or significantly imperil endangered species or necessary wildlife habitat. Exh. 8.A § IV.

Discussion

Based on the above findings, the Board finds that this project will not have an undue adverse effect on the aesthetics or scenic and natural beauty of the area. In reaching this conclusion, the Board has relied on the Environmental Board's methodology for determination of "undue" adverse effects on aesthetics and scenic and natural beauty as outlined in the so-called Quechee Lakes decision. *Quechee Lakes Corporation*, #3W0411-EB and 3W0439-EB, dated January 13, 1986.

As required by this decision, it is first appropriate to determine if the impact of the project will be adverse. The project would have an adverse impact on the aesthetics of the area if its design is out of context or not in harmony with the area in which it is located. If it is found that the impact would be adverse, it is then necessary to determine that such an impact would be "undue." Such a finding would be required if the project violates a clear written community

standard intended to preserve the aesthetics or scenic beauty of the area, if it would offend the sensibilities of the average person, or if generally available mitigating steps will not be taken to improve the harmony of the project with its surroundings. The Board's assessment of whether a particular project will have an "undue" adverse effect based on these three standards will be significantly informed by the overall societal benefits of the project.⁴

In this case, the Project will be located in a primarily forested area and would, therefore, be considered out of context with its surroundings. However, as noted in the above findings, the Project does not violate a clear written community standard and will not offend the sensibilities of the average person. In addition, the Petitioner has taken generally available steps, including siting the Project in a forested area and disguising the tower with artificial pine branches, which will provide screening and mitigate the visual impact of the Project on its surroundings. Therefore, we conclude that the Project will not have an undue adverse impact on the aesthetics of the surrounding area.

Development Affecting Public Investments

[10 V.S.A. § 6086(a)(9)(K)]

29. The Project will not unnecessarily or unreasonably endanger any public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to public investments. Exh. 8.A § IV.

Town and Regional Plans

[30 V.S.A. § 248a(c)(2)]

30. The Project, by providing wireless telecommunications services in a largely unserved area while preserving the rural and aesthetic character of the area, is consistent with both the Middletown Springs Town Plan and the Rutland Regional Plan. Exh. 8.A §§ V-VI.

4. Consider, for example, the benefits of an increase in wireless telecommunications services, or other social benefits.

State and Local Permits

[30 V.S.A. § 248a(d)]

31. There are presently no permits related to the parcel on which the Project site is to be located. Exh. 8.A § IV.

DISCUSSION

Schmitts' Comments

Pursuant to 30 V.S.A. § 248a and the Procedures Order, the Board must determine whether the application raises a significant issue with respect to the applicable criteria.⁵ The Schmitts argue that the Project will violate the goal of preserving ridgelines stated in the Town Plan and zoning bylaws, because it will be located "a mere 300 feet below the ridgeline summit."⁶ The Schmitts contend that construction of the Project will cause runoff and erosion which could potentially impact their property and water supply. The Schmitts posit that the Project could negatively impact "birds of prey" that they have seen in the area.⁷ The Schmitts also postulate that the Project can be seen "plain as day from Rt. 140/133 . . . " and "disguising it as a pine tree isn't going to fool anyone."⁸ Therefore, the Schmitts assert, the Petitioners should be required "to come up with alternative sites or technologies that will provide better coverage and won't harm the fragile ecosystem . . ."⁹

The Petitioners maintain that the location of the Project on a lower side slope of a ridgeline in a wooded area and the use of a monopine tower are mitigation measures chosen specifically to comply with the provisions of the Town Plan and zoning bylaws which require these types of measures.¹⁰ The Petitioners contend that because the Project will be located on a

5. Procedures Order at 5-6.

6. Schmitt comments at 1-2.

7. *Id.* at 2.

8. *Id.* at 3.

9. *Id.* at 3.

10. Petitioners Response at 2.

downslope and on the other side of the hill from the Schmitts' property, that the "only possible way the Schmitts . . . could be impacted by surface runoff from the site is if runoff were to somehow flow in the opposite direction - uphill - from its current route . . ."¹¹ The Petitioners also assert that while they have not identified any critical habitat or rare, threatened or endangered species, including birds, in the Project area to date, they plan to evaluate the Project area again prior to construction and will take any measures necessary to document and protect any newly identified rare or endangered species or sensitive habitats.¹²

We conclude that the Schmitts have failed to show that the Project raises a significant issue with respect to the applicable criteria. The Board accepts the Schmitts' contention that the Project will be visible from certain vantage points and that the Project will have an impact on views from these areas. However, as noted in the findings above, the Petitioners have taken reasonable measures to mitigate the aesthetic impact of the Project. Further, the Schmitts have failed to show that an alternative location or tower design would provide any discernable reduction in the aesthetic impact of the Project on the surrounding area. We also conclude that the Petitioners have taken reasonable measures to ensure the Project will not unduly impact the surrounding ecosystem or cause unreasonable runoff in the Project area.

Town's Comments

The Middletown Springs Selectboard contends that because the Project will not provide wireless coverage to the entire Town, the Petitioners should consider alternate sites or tower heights that would provide increased coverage.¹³

The Middletown Springs Conservation Commission requests that "Daisy Hill Road and Fitzgerald Road" be included in the photo simulation submitted by the Petitioners to better assess the visual impact of the Project from these locations.¹⁴ The Conservation Commission maintains that they are "not satisfied that a thorough environmental review has been conducted for the

11. *Id.* at 3.

12. *Id.* at 2-3.

13. Selectboard Comments at 1.

14. Conservation Commission Comments at 1.

proposed site."¹⁵ The Conservation Commission also contends that the Petitioners have not described how the Project complies with the land conservation measures contained in the Town and Regional Plans with respect to potential environmental impacts.¹⁶ Specifically, the Conservation Commission cites a provision in the Town Plan to "maintain, protect and restore biological diversity of native species, natural communities, rare and endangered species, natural ecosystem processes, and landscapes."¹⁷ Finally, the Conservation Commission requests that the Petitioners develop a plan to deal with the "potential threat of non-native invasive species spreading into the project area as a result of the proposed project."¹⁸

In response to the concerns raised by the Selectboard, the Petitioners argue that currently AT&T "has virtually no service in the Town" and that the "size of the Town and the surrounding topography means that coverage for entire Town cannot be achieved with a single cell site." The Petitioners maintain that the Project site "presents the best available location to maximize adequate and reliable coverage for the Town and to interconnect with other facilities" in surrounding areas.

In response to the Conservation Commission requests for additional photo simulation, the Petitioners state that, in response to earlier requests from the Town, they specifically included photo simulations of the Project from Daisy Hill Road and Fitzgerald Road as part of the petition and considered them in assessing the visual impact of the Project. The Petitioners argue that they have "conducted a thorough environmental due diligence for the Project."¹⁹ Further, the Petitioners contend, that while it is "highly unlikely based upon the research and site visits completed to-date, if any rare, threatened or endangered species, irreplaceable natural areas or necessary habitats are discovered during pre-construction evaluations, they will be documented and appropriate measures will be developed to ensure such species, areas or habitat are preserved

15. *Id.* at 1-2.

16. *Id.* at 2.

17. *Id.* at 2.

18. *Id.* at 2-3.

19. Petitioners' Response to Conservation Commission Comments at 2.

and protected accordingly." The Petitioners also assert that, as noted above, they have conducted a thorough analysis of the Project's potential environmental impacts and provided testimony in the petition describing the Project's compliance with the provisions of the Town and Regional Plans regarding environmental impacts.²⁰ With respect to the Conservation Commission's concerns regarding invasive plant species, the Petitioners state that they have developed a comprehensive plan to address the potential spread of invasive species at the Project site and included the plan as part of the petition.

We conclude that the Petitioners have adequately addressed the concerns expressed by both the Selectboard and the Conservation Commission. While the Project will not provide wireless coverage to the entire Town as requested by the Selectboard, it will provide coverage to what is currently a largely unserved area of the State and further the important statewide goal of providing wireless coverage to all areas of the State. We also conclude that, based upon the findings above, the Petitioners, through the testimony and other information provided in its petition, have adequately addressed all of the required criteria regarding the Project's environmental impacts, and the Project's compliance with the Town and Regional Plans. The Petitioners have also provided the requested additional photo simulations, a plan to deal with invasive plant species, and sufficient testimony and exhibits demonstrating the thorough environmental review conducted for the Project. The Board recognizes that telecommunications projects may have negative impacts on the surrounding areas and may not always provide the level of coverage desired. However, the provision of statewide wireless telecommunications services is an important goal for the State, and robust and ubiquitous wireless telecommunications coverage provide substantial benefits. Therefore, we conclude that no further evidence or information is necessary in order to render a decision on the Project.

V. CONCLUSION

Pursuant to 30 V.S.A. § 248a(a):

Notwithstanding any other provision of law, if the applicant seeks approval for the construction or installation of telecommunications facilities that are to be

20. *Id.* at 2-3.

interconnected with other telecommunications facilities proposed or already in existence, the applicant may obtain a certificate of public good issued by the public service board under this section, which the board may grant if it finds that the facilities will promote the general good of the state consistent with subsection 202c(b) of this title.

Further, pursuant to the Procedures Order:

Unless the Board determines that an application raises a significant issue, it shall issue a final determination on an application within 90 days of its filing

Based upon all of the above evidence, the petition does not raise a significant issue with respect to the relevant substantive criteria of 30 V.S.A. § 248a, the public interest is satisfied by the procedures authorized in 30 V.S.A. § 248a, and the proposed Project will promote the general good of the State.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that the installation and operation of communications facilities at the location specified in the above findings, by SBA Towers III, Inc., and New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, in accordance with the evidence and plans submitted in this proceeding, will promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248a(a), and a certificate of public good to that effect shall be issued in this matter.

Dated at Montpelier, Vermont, this 20th day April, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED:

Attest: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.